IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1285 OF 2002
IN
SUIT NO.1503 OF 2002

M.M.Corporation,
a partnership firm registered under
the provisions of the Indian
Partnership Act, 1932 having its
office at 117, Kamla Nivas, TPS IV,
Bajaj Road, Vile Parle (W),
Mumbai 400 056. ...Plaintiffs

Versus

1.Jagdish Jayanand Vyas,

2.Yogesh Balvantrai Vyas,

3.Kishor Balvantrai Vyas,

all Indian Inhabitants of Mumbai,
residing at 54, Tejpal Scheme
Road No.1, Surajben Compound,
Vile Parle (E),
Mumbai 400 057.

4.Gayatri Rajit Trivedi,
Indian Inhabitant of Mumbai,
residing at Bhagwati Niwas,
Natwar Nagar, Road No.4.,
Jogeshwari (East), Mumbai 400 060.

5.Kunkum Kirit Dave,
Indian Inhabitant of Mumbai,
residing at Municipal Bldg.,
Nana Chowk, Grant Road,
Mumbai 400 007.

5A.Mr.Kirit Khelshankar Dave (Widower)

5B.Ms.Avani Kirit Dave (daughter)

5C.Mr.Vikram Kirit Dave (son),

all of Mumbai, Indian Inhabitants,
having their address at 33,
Municipal Building, Jobanputra Compound,
Nana Chowk, Grant Road, Mumbai-400 007.

6.Haresh Sanmukhram Vyas,
Indian Inhabitant of Mumbai,
residing at 5, Popat Chawl,
Gogate Wadi Road, Goregaon (E),
Mumbai - 400 063. ...Defendants

WITH

NOTICE OF MOTION NO.742 OF 2007
IN
SUIT NO.528 OF 2007

Jagdish Jayanand Vyas,
of Mumbai, Indian Inhabitant,
residing at 54, Tejpal Scheme
Road No.1, Surajben Compound,
Vile Parle (E), Mumbai 400 057. ...Plaintiff

Versus

1.M.M.Corporation,
a partnership firm registered under
the provisions of the Indian
Partnership Act, 1932 having its
office at 117, Kamla Nivas, TPS IV,
Bajaj Road, Vile Parle (W),
Mumbai 400 056.

2.Mukund Mohan Garodia,

3.Mohammedali Aziz Gheewala,

both of Mumbai, Indian Inhabitants,
carrying on business at
117, Kamla Nivas, TPS IV,
Bajaj Road, Vile Parle (W),
Mumbai 400 056.

4.Yogesh Balvantrai Vyas,

5.Kishor Balvantrai Vyas,

both of Mumbai, Indian Inhabitants,
residing at 54, Tejpal Scheme
Road No.1, Surajben Compound,
Vile Parle (E), Mumbai 400 057.

6.Gayatri Rajat Trivedi,
of Mumbai, Indian Inhabitant,
residing at Bhagwati Niwas,
Natwar Nagar, Road No.4.,
Jogeshwari (East), Mumbai 400 060.

7.Kirit Khelshankar Dave,

8.Avani Kirit Dave,

9.Vikram Kirit Dave,

all of Mumbai, Indian Inhabitants,
residing at 33, Municipal Building,
Jobanputra Compound, Nana Chowk,
Grant Road, Mumbai-400 007.

10.Haresh Sanmukhram Vyas,
of Mumbai, Indian Inhabitant,
residing at 5, Popat Chawl,
Gogate Wadi Road, Goregaon (E),
Mumbai - 400 063. ...Defendants

.....

Mr.Z.A.Jariwala i/b Thakore Jariwala & Associates for the Plaintiffs in N/M 1285/02 & for Defendants 1, 2 & 3 in N/M 742/07.

Mr.D.H.Mehta, Sr.Counsel with Mr.H.C.Mehta & Mr.S.Nagvadaria i/b M/s.Mehta & Co. for Defendants 2 to 5C in N/M 1285/02 & for Defendants 4 to 9 in N/M 742/07.

Mr.Jayprakash Dhanuka for Defendant No.6 in NM 1285/02.

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CORAM: A.M.KHANWILKAR, J.

JUNE 18, 2007.

ORAL ORDER:

1. This common order will dispose of both the Notices of Motion as parties as well as suit properties in both these Motions are common.

2. The Defendants in the former Suit (Suit No.1503/2002) are the owners of a property bearing Plot No.58, C.T.S.No.428, final Plot No.20-A and 20-B of Town Planning Scheme IV situated at Tejpal Scheme, Vile Parle (East), Mumbai - 400 057. The property is owned by three sets of co-owners (hereinafter Defendant No.1 is referred to as 'the first set of co-owner', Defendants 2 to 5C are referred to as 'the second set of co-owners' and Defendant No.6 is referred to as 'the third set of co-owner'). The second set of co-owners together have 1/3rd share in the suit property, whereas, the first and the third set of co-owners in the said Suit have 1/3rd share each. The Plaintiffs (hereinafter referred to as 'the Purchasers' for

the sake of convenience), in the former Suit, claim to have purchased the suit property from all co-sharers (Defendants in the said Suit). The property contains several structures. Some of the structures are stated to be illegal (hereinafter referred to as ‘the suit property’).

3. According to the purchasers, the suit property is fully encroached by tenants and trespassers, more than sixty in number, which admeasures about 2796 square yards. The said property was mortgaged by the Defendants. The mortgagee had created encumbrance on the suit property by allowing trespassers, illegal repairing, subtenancy. The suit property was mortgaged to Lohana Kanya Chatralaya Dwarka Trust under two mortgages. The Defendants/owners were not in a position to repay the mortgage debt and redeem the property. The Trust was in possession and management of the suit property and collecting the rent from occupants. It is the purchasers who came forward to help the owners to redeem the suit property from the mortgage with the Trust. The Purchasers caused the owners to file a Suit for

redemption of the property against the Trust being Suit No.309 of 1983. During the pendency of the said Suit, the Trust, exercising the power of sale under the mortgage, had agreed to sell the property to one M/s.Sangeeta Construction Company for a sum of Rs.3,51,000/- (Rupees Three Lakhs Fifty-one Thousand). The said M/s.Sangeeta Construction Company, in turn, filed Suit being Suit No.1471 of 1989 and registered a *Lis Pendens* notice. Only with the help and guidance of the purchasers, the owners could pursue the said litigation. The purchasers claim that they managed to settle all issues with the Trust and also got the property redeemed and came out of litigation by paying a sum of Rs.5,15,000/- (Rupees Five Lakhs Fifteen Thousand). This amount was financed by the purchasers. It is the case of the purchasers that if the purchasers had not come forward to help the Defendants/owners, the property would have been permanently lost to the owners. The purchasers claim that the purchasers extended logistical as well as financial assistance to the owners, as they (Purchasers) wanted to purchase the suit property.

4. After the property was redeemed and came out of litigation, an Agreement was executed between the purchasers and all the owners/Defendants; whereby, the purchasers agreed to purchase the property for a sum of Rs.8,99,920/- (Rupees Eight Lakhs Ninety-nine Thousand Nine Hundred Twenty) to be paid in instalments as mentioned in the Agreement reduced into writing. This amount was fixed as consideration for FSI up to 6426 square feet of built up area. As per the understanding, the parties executed Agreement for Sale on 4th November 1985. Simultaneously, the owners executed Power of Attorney in favour of the purchasers permitting the purchasers to construct and develop the suit property. Later on, in 1987, the suit property was declared as slum by the appropriate Authority. That declaration was contested by filing Appeal by the owners with the assistance of the purchasers. It is the case of the purchasers that because of the declaration of the suit property as slum area, the purchasers were unable to develop the property and instead, the purchasers spent large amounts of money over the suit property to preserve the same. The Suit

preferred by the owners being Suit No.309 of 1983 for redemption of the property was finally settled on 20th September 1989 by filing Consent Terms. The Purchasers financed payment of monies as per the Consent Terms and got the property released from the Trust. After the filing of the Consent Terms in the said Suit, the Court Receiver handed over possession of the suit property to the purchasers. The fact that purchasers were allowed to take over possession of the suit property from the Court Receiver is not in dispute. The purchasers' claim that since then they are in lawful possession of the suit property.

5. According to the purchasers, they have paid full consideration of Rs.8,89,920/- (Rupees Eight Lakhs Eighty-nine Thousand Nine Hundred Twenty Only) which was payable by the purchasers as per the Agreement dated 4th November 1985. However, the parties entered into another Agreement on 23rd October 1989, to modify and alter the terms of the earlier Agreement to the extent that the purchasers agreed to pay consideration at the rate of Rs.140/- per square feet on additional FSI

available over and above 6428 square feet upon issuance of I.O.D. in respect of the suit property by the appropriate Authority. This change was brought about as it transpired that FSI in respect of the suit property, in view of the extant regulations, would be much more than the original area of FSI referred to in the Agreement dated 4th November 1985. It is not in dispute that the Advocates for the owners have had handed over original title deeds in respect of the suit property to the Advocate for the purchasers on 17th November 1989. It is the case of the purchasers that after the suit property became free from mortgage and litigation, the co-owners started demanding additional consideration inspite of the supplementary agreement dated 23rd October 1989. The owners now started demanding ownership of residential flats in the suit property in lieu of the premises occupied by them on the property. The purchasers state that even this unjustified demand of the owners was conceded by the purchasers. Nevertheless, one of the co-owner Shri Sanmukhram J.Vyas who had no premises on the property and was staying at Goregaon, raised dispute about the right

of other two branches to get alternative premises and insisted that even he should be offered residential flat in the suit property after it is developed. The purchasers state that the owners executed another Power of Attorney in favour of the partner of Plaintiffs on 30th October 1991 for the purpose of collection of rent on behalf of the owners and other matters referred to therein against their undertaking to render full, free and complete account of collection of rent and expenses made therefrom and to hand over the balance amount to the owners.

6. That the said Sanmukhram J.Vyas (since deceased)/the father of Defendant No.6, however, lateron, proceeded to terminate and revoked the Agreement dated 4th November 1985 and Power of Attorney which was executed in favour of the purchasers. This happened on 13th November 1995. This drastic step was taken by the third set of co-owner on account of refusal by the purchasers to succumb to his unfair demand of alternate premises though he was not occupying any premises in the suit property, unlike the other co-owners.

Significantly, the action of said Sanmukhram J.Vyas was expressly disowned by the first set of co-owner. Besides issuing letter of termination, the said Sanmukhram J.Vyas filed Suit in this Court being Suit No.1626 of 1996 against the purchasers. During the pendency of the Suit, prayer for interim relief was pressed which, however, came to be rejected initially by the Single Judge and lateron, by the Division Bench of this Court in Appeal. In the said proceedings, the first and the second sets of co-owners filed two separate affidavits supporting the purchasers and disputing the termination and have also confirmed the fact that the purchasers were in possession of the suit property.

7. The purchasers state that on 29th July 1999, the Defendant Nos.1 and 2, by intimation sent in writing to the purchasers, terminated the Agreement dated 4th November 1985 as also the Supplementary Agreement dated 23rd October 1989. The purchasers have filed the present Suit being Suit No.1503 of 2002 to question the said action and for a declaration that the Agreement for Sale

dated 4th October 1985 read with Supplementary Agreement dated 23rd October 1989 is valid, subsisting, binding and effective upon the owners; and the purchasers were entitled to relief of specific performance thereof. The reliefs claimed in the present Suit No.1503 of 2002 read thus:

> "a) for a declaration of this Hon'ble Court that the agreement for sale dated 4th November, 1985 (being Ex."B" hereto) read with the supplementary agreement dated 23rd October, 1989 (Ex."F" hereto) is valid, subsisting, binding and effective upon the Defendants and that the Plaintiffs are entitled to the specific performance thereof;
>
> b) that the Defendants and each of them be ordered and decreed to specifically perform their respective obligations under the said agreement for sale dated 4th November, 1985 (being Ex."B" hereto) read with the supplementary agreement dated 23rd October, 1989 (Ex."F" hereto) and to do all necessary acts, deeds, matters and things for the due observance and performance thereof and in addition thereto to pay to the Plaintiffs the sum of Rs.50,00,000/- (Rupees fifty lacs only) as and by way of damages together with interest thereon at the rate of 18% per annum from the date of the Suit till payment and/or realisation;
>
> c) that pending the hearing and final disposal of the Suit the Court Receiver, High Court, Bombay be appointed as Receiver in respect of the suit property, a more particular description whereof is

given in Ex."A" hereto, with all powers under Order XL Rule 1 of the Code of Civil Procedure, 1908 including the power to collect rents/compensation from all the tenants/occupants in the suit property;

d) that pending the hearing and final disposal of the Suit the Defendants and each of them be restrained by and order and injunction of this Hon'ble Court by themselves, their servants and/or agents:

i) from transferring and/or encumbering and/or alienating and/or in any manner dealing with and/or disposing of the suit property or any part thereof;

ii) creating any right, title or interest in favour of any person/s in respect of suit property or any part thereof and/or in any manner disturbing and/or altering the status quo with regard to suit property or any part thereof;

iii) from creating any fresh tenancy in respect of any premises which may fall vacant and/or from creating any new tenancy of and/or transfer any tenancy and/or altering or permitting to be altered the status quo regarding the existing occupancies and any right thereto;

e) that pending the hearing and final disposal of the Suit the Defendants and each of them by themselves and/or through their servants and/or agents be restrained by an order and injunction of this Hon'ble Court from disturbing and/or interfering with the Plaintiffs' possession of the suit property;

f) for ad-interim reliefs in terms of prayers (c) and/or (d) and/or (e) above;

g) for the costs of and incidental to this Suit;

h) for such further and other reliefs as the nature and circumstances of the case may require."

8. During the pendency of this Suit, the purchasers have taken out Notice of Motion No.1285 of 2002 praying for interim relief in terms of prayer clauses (d) and (e) above. In addition, relief of appointment of Court Receiver is also claimed. While this proceedings were pending, sincere attempt was made by the purchasers to amicably settle the matter with the owners. The purchasers succeeded in finalising the terms of settlement. It is not necessary to elaborate on this, as the same will have no bearing on the points in issue. Suffice it to observe that eventually it is only the second set of co-owners/1/3rd owners agreed to execute the Consent Terms with the purchasers. Accordingly, second set of co-owners in Suit No.1503 of 2002 (1/3rd owners) executed Consent Terms on 18th

December 2006 in favour of the purchasers in respect of their 1/3rd undivided share in the suit property. As a result of this development, the purchasers now claim to have become owners in respect of the 1/3rd undivided share in the suit property to represent the share of second set of co-owners.

9. The first set of co-owner has now filed a Suit being Suit No.528 of 2007, challenging the Consent Terms entered into between the purchasers and the said second set of co-owners in Suit No.1503 of 2002, praying for following reliefs:

> "a) This Hon'ble Court be pleased to adjudge the Consent Terms dated 18th December 2006 entered into by the Defendant Nos.1 to 9 (being Exhibit B to the Plaint) as void and/or voidable, and order that the said Consent Terms be rescinded and be delivered up and cancelled.
>
> b) This Hon'ble Court, as a consequence to prayer (a) above, be pleased to set aside the Order dated 18th December 2006 (being Exhibit B-1 to the Plaint);
>
> c) This Hon'ble Court be pleased to pass and order of permanent injunction to restrain the Defendant Nos.1 to 9 by themselves or through their servants and

agents and/or through any person acting for or on behalf of the Defendant Nos.1 to 9 from in any manner acting pursuant to and/or in furtherance of the Consent Terms dated 18th December 2006/the Order dated 18th December 2006 (being Exhibits B and B-1 to the Plaint).

d) Pending the hearing and final disposal of the Suit this Hon'ble Court be pleased to pass and order of temporary injunction to restrain the Defendant Nos.1to 9 by themselves or through their servants and agents and/or through any person acting for or on behalf of the Defendant Nos.1 to 9 from in any manner acting pursuant to and/or ion furtherance of the Consent Terms dated 18th December 2006/the Order dated 18th December 2006 (being Exhibits B and B-1 to the Plaint).

e) Pending the hearing and final disposal of this Suit this Hon'ble Court be please to issue a mandatory order and injunction to direct the Defendant Nos.1 to 3, their servants, agents, security guards and/or any person acting for or on behalf of the Defendant Nos.1 to 3 to remove themselves from the Suit property;

f) For interim and ad-interim reliefs in terms of prayers (d) and (e) hereinabove;

g) For costs;

h) For such further and other reliefs as the nature and circumstances of the case may require".

10. The first set of co-owner Jagdish J.Vyas has also taken out Notice of Motion being Notice of Motion No.742 of 2007 for interlocutory relief in

the following terms:

"a) Pending the hearing and final disposal of the Suit this Hon'ble Court be pleased to pass an order of temporary injunction to restrain the Defendant Nos.1 to 9 by themselves or through their servants and agents and/or through any person acting for or on behalf of the Defendant Nos.1 to 9 from in any manner acting pursuant to and/or in furtherance of the Consent Terms dated 18th December 2006/the Order dated 18th December 2006 (being Exhibits B and B-1 to the Plaint).

b) Pending the hearing and final disposal of the Suit this Hon'ble Court be pleased to pass an order of temporary injunction to restrain the Defendant Nos.1 to 9 by themselves or through their servants and agents and/or through any person acting for or on behalf of the Defendant Nos.1 to 9 from in any manner:

(i) Interfering with the Plaintiff's possession in respect of the suit property.

(ii) Placing their security guards on the suit property.

(iii) Collecting and/or attempting to collect rent from the tenants/occupants of the suit property in respect of their respective premises and/or taking any action/proceedings against the tenants/occupants on the said property and/or dealing with them in respect of their tenancy rights in any manner whatsoever.

(iv) Carrying out any construction and/or development on the suit property.

(v) Putting up or having sanctioned any plans for development of the said property before any concerned authorities and/or taking any steps for development of the said property.

c) Pending the hearing and final disposal of this Suit this Hon’ble Court be pleased to issue a mandatory order and injunction to direct the Defendant Nos.1 to 3, their servants, agents, security guards and/or any person acting for or on behalf of the Defendant Nos.1 to 3 to remove themselves from the Suit Property;

d) For interim and ad-interim relies in terms of prayers (a) to (c) hereinabove;

e) For costs;

f) For such further and other reliefs as the nature and circumstances of the case may require".

11. Both sides have filed reply affidavit contesting the claim of the opposite party in the respective proceedings. Insofar as the Suit filed by the purchasers, Counsel for the first set of co-owner has opposed interim relief claimed by the purchasers essentially on four counts. He has argued that the Suit filed by the purchasers is barred by Law of Limitation. Secondly, that the Suit was not maintainable. As the Suit is founded on the doctrine of part performance, it is not open for the purchasers to assert title. Further, as the purchasers have no title in the suit property, they are not entitled for any interim protection. It is next contended that assuming the purchasers' case that they have become owners by purchasing the 1/3rd undivided share in the suit property of the second set of co-owners is accepted, the purchasers would become entitled for any interim relief only after the suit property is partitioned and the property which has gone to the respective co-owner

is earmarked, only to that extent. It is lastly argued that the suit agreement dated 4th November 1985 is frustrated on account of the subsequent development of suit property having been declared as slum area in 1987.

12. The second set of co-owners, however, have supported the claim of the purchasers. The third set of co-owners would support the argument of first set of co-owner and submit that the purchasers are not entitled for any interim relief.

13. Insofar as the Notice of Motion taken out by the first set of co-owner Jagdish J.Vyas is concerned, the outcome thereof will much be dependent on the view that is taken in respect of the argument canvassed on his behalf to oppose grant of any interim relief to the purchasers. I shall address this aspect a little later.

14. Having considered the rival submissions and going through the pleadings and documents on record, I have no hesitation in taking the view that there was concluded contract between the parties which is

recorded in the Agreement in writing dated 4th November 1985 which was modified and altered to the limited extent of further consideration amount in terms of Agreement in writing dated 23rd October 1989. There is also no doubt that the purchasers have been put in possession of the suit property on 20th September 1989, albeit, by the Court Receiver, in view of the disposal of the Suit No.309 of 1983 filed by the co-owners against Trust for redemption of the suit property. Indeed, some dispute has been raised by the first and third set of co-owners about the factum of possession, however, there is no substance in the said stand of first and third set of co-owners. This is so because in the first place, the claim of the purchasers that they have been put in possession of the suit property by the Court Receiver is substantiated by documents on record; and the third set of co-owner/Haresh Sanmukhram Vyas has conceded the factum of possession of the suit property with the purchasers as back as in April 1996 as can be discerned from the legal notice sent by his Advocate dated 22nd April 1996. In Paragraph 15 of the said legal notice, it is clearly asserted on his behalf that he was conscious of the fact that the other two co-owners may not join the

first set of co-owner in filing the proposed suit for declaration that the Agreement dated 4th November 1985 is void, "for return of possession", for partition, for accounts and for means profits, for injunction and for such other reliefs. Suffice it to note that the fact that the co-owners were not in possession of the suit property, is conceded by mentioning that the proposed Suit to be filed by him would also be for relief of return of possession of the suit property. Insofar as first set of co-owner Jagdish J.Vyas is concerned, in para 2 of the affidavit dated 24th September 1988 filed by him in Appeal No.873 of 1998 arising out of interlocutory order passed in Suit No.1626 of 1996 which was filed by the third set of co-owners, he has supported the claim of the purchasers by asserting that the Suit filed by the third set of co-owners was false and vexatious and filed in order to pressurise the co-owners to concede to his unjust and improper demand and to extort money and cause loss and damage to the purchasers. In Paragraph 8 of the affidavit, it is expressly conceded by the first set of co-owner that the purchasers were put in possession of the suit property upon the Court Receiver handing over possession thereof in terms of the order passed in Suit

No.309 of 1983, pursuant to the suit agreement i.e. dated 4th November 1985. Accordingly, there is no doubt that there was concluded contract between the purchasers and co-owners in respect of the suit property and the purchasers have been put in possession of the suit property and that they have remained in possession thereof since then.

15. Accordingly, I will straightaway deal with the argument of the first set of co-owner Jagdish J.Vyas regarding suit filed by the purchasers being barred by limitation. According to him, the period of limitation will be governed by Article 54 of the Limitation Act which postulates that the limitation would start running from the knowledge of the accrual of cause of action. It is submitted that insofar as third set of co-owner is concerned, he had terminated the suit Agreement by sending intimation in writing on 13th November 1995. Insofar as he himself (i.e. first set of co-owner) is concerned, he had given legal notice to the purchasers on 12th January 1998 clearly spelling out that the purchasers were in default by not discharging their obligations and undertakings in

respect of matters specified in the said notice and also put the purchasers to notice that if remedial steps were not taken, he would be forced to adopt appropriate steps and actions. At any rate, by legal notice dated 23rd September 1998, first set of co-owner had terminated the Power of Attorney dated 30th October 1991 given in favour of the purchasers. It is submitted that termination and revocation of Power of Attorney which was operating in favour of purchasers, was clear indication of the fact that this set of co-owner has refused to continue with the suit agreement and that clearly gave rise to cause of action for the purchasers to institute present action. The argument further proceeds that on cancellation of Power of Attorney, there was no subsisting recognised right in favour of the purchasers, as the fulcrum of the suit agreement was to permit the purchasers to develop the property. By withdrawing Power of Attorney, that right came to an end and the purchasers could not have been permitted to develop the property any more.

16. The above argument seems to be attractive

at the first blush but is devoid of any substance. Insofar as the legal notice given by the third set of co-owner dated 13th October 1995 is concerned, it is seen that notwithstanding the said notice, the purchasers were acting on the suit Agreement as the other co-owners had disowned the action of the said third set of co-owner of terminating and revoking the said agreement. In any case, the third set of co-owner filed substantive suit on 14th May 1996 being Suit No.1626 of 1996 for declaration, amongst others, that the suit Agreement was not subsisting and was not binding on him. In the said Suit, the issue as to whether the suit Agreement is binding on the said co-owner or not, will have to be tested and is subjudice. For that reason, the present Suit filed by the purchasers being Suit NO.1503 of 2002 cannot be said to be barred by law of Limitation as such.

17. Insofar as the argument of the first set of co-owner Jagdish J.Vyas that the cause of action arose firstly in view of his legal notice dated January 12, 1998 sent to the purchasers is concerned, that deserves to be stated to be

rejected. This communication, however, would only show that the notice sender placed on record his unhappiness or reservation about the state of affairs and had warned the purchasers to discharge their obligations and undertaking under the suit Agreement and take remedial steps, failing which, he may take and adopt appropriate steps and action. That notice, by no stretch of imagination, can be said to have given notice to the purchasers that the notice sender (co-owner) would not perform his part of the obligations under the suit Agreement thereafter and intended to terminate the arrangement as such. Insofar as the argument of the first set of co-owner that the cause of action arose at least on account of the legal notice dated September 23, 1998 is concerned, even that argument is misplaced. To consider this argument, I think it apposite to extract the relevant portion of the said legal notice dated September 23, 1998 which reads thus:

> "We have to invite your attention to our letter dated January 12, 1998, addressed to you, and have to note that in spite of our final notice contained in our said

letter to you, your clients have failed and neglected and wilfully avoided to carry out their obligations and undertakings to render and submit true, proper and complete accounts in respect of rents/compensation payable by the tenants/occupants of the subject property recoverable and recovered by your clients from and after January 1994, and/or to make any payment thereout.

Your clients having failed and not complied with our said final notice, please note that the Power of Attorney dated 30th October 1991 in favour of Mr.Mohmedali Jeeva and Mr.Mukund M.Goradia, partners of your clients is hereby revoked and cancelled and shall be deemed to have been withdrawn by our clients Mr.Jagdish J.Vyas and Mr.Yogesh B.Vyas for self, and as karta and Manager of his H.U.F., and your clients are hereby called upon not to act under the said Power of Attorney with effect from the receipt by you and to return the said Power of Attorney to us on behalf of our clients. You are aware that Mr.Sanmukhlal J.Vyas has already separately cancelled the said Power of Attorney.

Your clients are hereby further called to render accounts and give detailed particulars of the rents/compensation collected from the Tenants/Occupants with their full particulars including of the arrears outstanding due and payable by them, and also of disbursements of property taxes and outgoings effective from January 1, 1994, up to date. Our clients will take necessary steps and actions so as not to allow and permit your clients to collect, recover or receive any rent/compensation from any of the tenants/occupants of the above property, and/or act or take any other steps hereafter under and by virtue of the said cancelled Power of attorney dated 30th

> October 1991.
>
> Our clients will also take appropriate steps and action as they may be advised as regards your clients defaults, failure and negligence to carry out their obligations under the subject Agreement and various other agreements and arrangements made by them with our clients, and it may be noted that your clients will be held fully responsible for all the consequences arising therefrom and the costs, charges, expenses, loss and damage incurred or suffered by our clients."

. From the plain language of this communication, it is obvious that what it purports to do is only to terminate and revoke the Power of Attorney dated 30th October 1991 given in favour of the purchasers which authorised the purchasers to collect rent from the occupants of the suit property on behalf of the owners. This is surely not a notice of termination of the suit Agreements so as to give rise to cause of action to the purchasers to institute suit for relief of specific performance. On the other hand, in the penultimate paragraph of this legal notice, the first set of co-owner has conceded that he would also take appropriate steps as may be advised against the purchasers on their failure and negligence to carry

out their obligations under the suit Agreement and various other Agreements and arrangements made by them with the owners. In other words, it indicates that insofar as the suit Agreement is concerned, the first set of co-owner was contemplating separate action against the purchasers. Assuming that the intention of the first set of co-owner under this legal notice dated 23rd September 1998 was to give intimation to the purchasers that hereafter they have no intention to continue with the arrangement under the suit Agreements, however, such intention is not expressly spelt out in the document itself. The document, however, is a misleading one. In that, the first set of co-owner has merely terminated the Power of Attorney dated 30th October 1991. Indeed, Counsel for the Defendant would contend that subsistence of the Power of Attorney was *sine qua non* for acting upon the terms of the suit agreements. As the Power of Attorney stood terminated, there was no authority in the purchasers to deal with the suit property. This argument is misplaced. For, the right derived by the purchasers is under the suit agreement - specific performance whereof is sought. The

revocation of Power of Attorney cannot eclipse that right, but at best, postpone the authority of the purchasers to deal with the property to develop the same till the Sale Deed or Conveyance is executed in their favour in furtherance of the suit agreements. Suffice it to observe that revocation of Power of Attorney *per se* does not result in conveying unwillingness to perform the obligations under the suit agreements. As mentioned earlier, the Power of Attorney revoked is of 1991 which permitted the purchasers amongst others, to collect rent from the occupants. The legal notice does not even remotely suggest that the owners were unwilling to perform under the suit agreements even though the purchasers were willing to discharge their obligations under the same agreements. Accordingly, this legal notice cannot be pressed into service to contend that the same gave rise to the cause of action to institute suit for specific performance of the suit Agreement. That cause of action arose only when the purchasers were served with an unambiguous notice from the first set of co-owner dated 29th July 1999. As the present Suit has been filed within three years from that date,

it is not possible to countenance the objection of the first set of co-owner that the Suit is barred by Law of Limitation.

18. Counsel for the said co-owner had relied on the decision of the Apex Court in the case of **Venkappa Gurappa Hosur v. Kasawwa c/o Rangappa Kulgod reported in (1997) 10 SCC 66** to contend that the cause of action for the purpose of Article 54 of the Limitation Act would arise from the date of knowledge of the fact that the owner has denied to act upon the suit Agreement. The dictum in this decision, however, is in the fact situation of that case. In that case, the Defendant had filed Suit in 1960 for possession of the suit property, which Suit was decided in favour of the Defendant on 9th November 1971. It is only thereafter the Plaintiff had issued notice for the first time on 22nd August 1972 for performance of the suit Agreement and proceeded to file Suit on 5th November 1972 on the assertion of denial of execution of the Agreement. In that case, the Apex Court found as of fact that the suit document itself was denied by the Defendant as early as in 1960. In the present

case, for the reasons already recorded earlier, it is not possible to hold that the first set of Defendant either denied execution of the document or had unambiguously terminated the suit Agreement until the legal notice dated 29th July 1999.

19. Reliance was then placed on the another decision of the Apex Court in the case of **R.K.Parvatharaj Gupta vs. K.C.Jayadeva Reddy reported in (2006) 2 SCC 428**. Emphasis was placed on the exposition, in particular, Paragraph 4 of the said decision. Even in that case, the finding recorded by the Court was that the legal notice was given to the Respondent asking him to deposit the Agreement amount with the Central Bank of India forthwith in view of the demand notice issued by the Central Bank of India to the owner, failing which, coercive action was threatened against the owner. By the same notice, therefore, the Respondent was clearly informed to deposit the agreement amount with the Central Bank of India forthwith and get the Sale Deed executed within fifteen days from the date of receipt of the notice, failing which, the Agreement to Sale shall

stand cancelled and the owner would be at liberty to deal with the property to the best of his advantage. In other words, the notice given by the Respondent in the said case was clearly a self operative one. It provided final fifteen days time to the Respondent to pay the agreement amount and execute the Sale Deed, failing which, the Agreement was to stand cancelled. It is not possible to even remotely suggest that the tenor of the legal notice issued by the first set of co-owner either on 12th January 1998 or 23rd September 1998 was clear indication of such conditional termination or revocation of the suit agreements.

20. That takes me to the next contention of the first set of co-owner that the Suit was not maintainable as the purchasers were claiming relief based on the doctrine of part performance. In such a Suit, the purchasers cannot assert title. To support this submission, reliance is placed on the decision of the Apex Court in the case of **Patel Natwarlal Rupji vs. Kondh Group Kheti Vishayak & Anr. reported in (1996) 7 SCC 690**. Indeed, the purport of Section 53-A of the Transfer of Property

Act has been considered by the Apex Court. The Apex Court has restated the legal position that Section 53-A confers a right on the transferee, to the extent it imposes a bar on the transferor, to protect the transferee's right to retain possession of the property had under the contract. Besides, Section 53-A confers no title on the transferee but imposes a statutory bar on the transferor to seek possession of the immovable property from the transferee. It is also observed in Para 8 of the decision that the contract for sale of immovable property does not create any title except when covered under Section 54 of the Act and registered under Section 17 of the Registration Act. Equally, it does not create an interest in the property. It merely gives a right to enforce it specifically as an equitable relief in a Court of Law. In my opinion, reliance placed on this decision by the owners is misplaced. Inasmuch as, the Suit filed by the purchasers is not simplicitor for injunction on the basis of title as such, unlike in the case before the Apex Court where the Suit was for a declaration by the purchaser who was in possession of the suit land in part performance that the suit

land was not liable to attachment or sale by public auction to execute the Award made in favour of the Society. In the present case, on reading the Plaint as a whole, and in particular, the reliefs claimed by the purchasers, there is hardly any doubt that the Suit filed by the purchasers is for relief of specific performance of the suit agreements. It makes no difference if the purchasers have become owners in respect of 1/3rd undivided share, which was represented by second set of co-owners, in view of the Consent Terms arrived at during the pendency of the Suit. That does not take the matter any further. The fact remains that the Suit filed by the purchasers is not founded on the assertion of title in the suit property, but is a simplicitor suit to exercise right to enforce the suit agreements specifically as an equitable relief in the Court of Law. Accordingly, the submission that the Suit is not maintainable, does not commend to me.

21. It was then contended that the purchasers having become owners in respect of 1/3rd undivided share in the suit property purchased from second

set of co-owners, would succeed in getting the relief only after the suit property was partitioned and a portion of the property was to be earmarked as owned by the separate set of co-owners. Counsel for the first set of co-owner pressed into service decision of the Apex Court in the case of **A.Abdul Rashid Khan (Dead) & Ors. vs. P.A.K.A.Shahul Hamid & Ors. reported in (2000) 10 SCC 636**, with special emphasis on exposition in Paragraph 14 thereof. This decision will be of no avail. In the said case, the question considered by the Apex Court was whether the High Court was right in decreeing the Suit for specific performance to the extent of share of the Appellants. In fact, the argument of the co-owners that in addition to the relief of specific performance, the purchasers were required to ask for relief of partition, has been overturned by the Apex Court in the said decision. In that case besides the relief of specific performance, the Plaintiff had prayed for alternative relief for partition of the suit property in six equal shares by metes and bounds and delivering separate possession over such shares to the respective shareholders. The Apex Court

while overturning the decision of the High Court, observed that on the date of filing of the suit the vendee had not become the owner of the property as he merely seeks right in the said property through the decree of specific performance. Indeed, in Para 14 of the same decision, the Apex Court has noted that in the absence of the other co-sharer, there could not be any decree of any specified part of the property to be partitioned and possession given. That the decree could only be to the extent of transferring the share of the Appellants in such property to other such contracting party. The Plaintiffs' suit for specific performance was therefore decreed to the extent of 5/6th share, which decree was upheld by the Apex Court. Same position may obtain in the present case if the purchasers were to succeed in getting decree of specific performance of the suit agreements to the extent of 2/3rd share in the suit property which is represented by the other co-owners. The fact that the purchasers have stepped in the shoes of the second set of co-owners will not preclude the purchasers from pursuing the Suit for specific performance against the remaining two sets of

co-owners. That remedy remains unaffected. For invoking that remedy, it will not be necessary for the purchasers to seek a decree of Partition of the suit property. That relief would become relevant only if the purchasers were to fail in getting relief of specific performance against the remaining two sets of co-owners. In other words, if the Suit filed by the purchasers were to be dismissed, even then, the purchasers would be free to deal with the suit property to the extent of their 1/3rd share, provided the suit property was to be partitioned. As at present, the purchasers can be content with pursuing the remedy of relief of specific performance against the remaining two sets of co-owners who have refused to discharge

their obligations and undertakings under the suit agreements.

22. It was then contended that the suit agreement is frustrated on account of the subsequent development of suit property having been declared as slum area in the year 1987. In the first place, no provision of law has been brought to my notice or known to me that will

frustrate the subsisting Agreement for Sale, as a consequence of posterior declaration of the agreement property as a slum area by the appropriate authority. Indeed, the suit property has been declared as slum area but then the purchasers will have to claim the said property as it is, if they want the agreement to be performed. This argument in any case cannot lie in the mouth of the owners to contend that the agreement is frustrated consequent to declaration of the property as a slum area by the appropriate Authority. Perhaps, such a grievance can be made by the purchasers where during the interregnum- execution of Agreement to Sale and the Sale Deed- the status of the property has undergone a drastic change, not on account of the fault of the purchasers; that they will be left with nothing to develop or enjoy the property perceived by them when the agreement was executed. Be that as it may, the decision of the Apex Court which is pressed into service by the co-owners is inapposite to the fact situation of this case.

23. The next question is as to whether the purchasers were willing to perform their part of the obligations under the suit Agreement. As presently

advised, I am inclined to accept the claim of the purchasers that they have substantially complied with their obligations by paying the entire amount under the original suit Agreement. Insofar as the further consideration amount payable as per the supplementary agreement, that, as per the agreement, would become payable after I.O.D. in respect of the suit property is issued by the appropriate authority. Although that stage has not come, the purchasers have deposited sum of Rs.10,00,000/- (Rupees Ten Lakhs) in this Court in obedience of the directions given by this Court on the earlier occasion. Besides, as the property is substantially encroached upon and encumbered and is declared as slum area and that there has been change in the policy of redevelopment of slum area from time to time, all these factors have delayed the development of the property in terms of the suit agreement. It is not a case of purchasers avoiding to discharge their obligation as such. In other words, the purchasers are willing to discharge their obligation but for circumstances beyond their control, the property has remained undeveloped so far inspite of the suit agreement. Even the issues of balance of convenience and irreparable loss are tilled in favour of the

purchasers. In fact, no argument was canvassed on behalf of the co-owners to dispute or contest that position.

24. As no other argument has been advanced on behalf of the contesting co-owners and on the finding that there is concluded contract and that the purchasers have been put in possession of the suit property, coupled with the fact that the purchasers have paid the entire consideration amount as per the original suit Agreement dated 4th November 1985 and that the purchasers have deposited sum of Rs.10,00,000/- (Rupees Ten Lakhs) in this Court during the pendency of the present proceedings, in my opinion, the purchasers are entitled for relief in terms of prayer clauses (b) and (c) of the Notice of Motion during the pendency of the Suit, on condition that the purchasers will submit all the accounts in respect of the rents collected by them from the occupants from time to time till date, including the expenses and other outgoings incurred by them for preservation of the suit property. Accounts to be submitted before this Court should be certified by the Chartered

Accountant. That be submitted in this Court within eight weeks from today. In addition, the purchasers will have to submit such accounts for future period on quarterly basis regularly. The purchasers will take all such steps including appointment of security guards to preserve the suit property from any further encroachment. The purchasers will submit list of all the present occupants with the area of structure on the suit property in their possession.

25. Interim relief is granted in favour of the purchasers in terms of prayer clauses (b) and (c) of Motion No.1285 of 2002 on the above conditions. Prayer clauses (b) and (c) read thus:

> "b) that pending the hearing and final disposal of the Suit the Defendants and each of them be restrained by and order and injunction of this Hon'ble Court by themselves, their servants and/or agents:
>
> i) from transferring and/or encumbering and/or alienating and/or in any manner dealing with and/or disposing of the suit property or any part thereof;
>
> ii) creating any right, title

or interest in favour of any person/s in respect of suit property or any part thereof and/or in any manner disturbing and/or altering the status quo with regard to suit property or any part thereof;

iii) from creating any fresh tenancy in respect of any premises which may fall vacant and/or from creating any new tenancy of and/or transfer any tenancy and/or altering or permitting to be altered the status quo regarding the existing occupancies and any right thereto;

c) that pending the hearing and final disposal of the Suit the Defendants and each of them by themselves and/or through their servants and/or agents be restrained by an order and injunction of this Hon'ble Court from disturbing and/or interfering with the Plaintiffs' possession of the suit property."

26. In view of this arrangement, there is no need to consider prayer for appointment of Court Receiver in respect of the suit property at the instance of the purchasers.

27. Insofar as the Notice of Motion taken out by the first set of co-owner being Notice of Motion No.742 of 2007 is concerned, as the purchasers have not prayed for any relief in their Motion to permit

them to act in any manner pursuant to the Consent Terms dated 18th December 2006, the question of considering prayer clause (a) of the Motion does not arise. For, the limited relief granted to the purchasers is, in substance, to maintain status-quo as of today with regard to the suit property.

28. Insofar as prayer clause (b) of the latter Motion is concerned, that is on the misplaced assumption that the first set of co-owner Jagdish J.Vyas is in possession of the suit property. As has been found while dealing with the Notice of Motion of the purchasers, there is convincing material to hold that the purchasers have been put in possession of the suit property. On that finding, it is not possible to entertain the relief in terms of prayer clause (b) of the Motion taken out by the first set of co-owner. The apprehension of the first set of co-owner of the suit property will be wasted by allowing further encroachments, has already been taken care of, while requiring the purchasers to ensure that the suit property is properly preserved, including by appointing security services and by submitting statement of

names of present occupants and the area of structures presently occupied by them on the suit property. The purchasers have been collecting rent in the past. They would continue to do so on submitting accounts to the Court on regular basis. Moreover, the purchasers are not permitted to carry out any construction or development on the suit property, or to submit plans for development of the suit property to the appropriate authority, nor such relief is sought by them. For all these reasons, reliefs in terms of prayer clauses (b) and (c) of the Motion taken out by the first set of co-owner cannot be granted. Accordingly, the Motion taken out by the first set of co-owner will have to be disposed of in the above terms.

29. For the aforesaid reasons, following order is passed:

(a) Notice of Motion preferred by the purchasers being Notice of Motion No.1285 of 2002 is made absolute in terms of prayer clauses (b) and (c) on conditions specified in Paragraph No.18 of the order,

to be observed by the purchasers meticulously.

(b) Notice of Motion preferred by the first set of co-owner being Notice of Motion No.742 of 2007 is disposed of.

(c) No order as to costs.

A.M.KHANWILKAR, J.